



Thanks again for
choosing *americast*!

May 29, 1997

PRESORTED FIRST-CLASS

Mr Brett Heimburger

Chicago IL 60657-5020

|||||

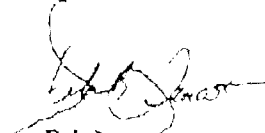
Dear Mr Brett Heimburger:

As a new *americast*™ customer, we hope you're enjoying all the fun and excitement that our service has to offer. We're proud to bring you more movies and special events . . . an enhanced Interactive Program Guide for simple VCR recording and parental-control . . . leading-edge technology for superior reception . . . and the Ameritech® "At Your Service" Center for around-the-clock assistance!

And as promised, we're giving you \$60 worth of savings. We've enclosed the first three of your AmeriChecks™ — each valued at \$10. AmeriChecks work like cash toward Ameritech services.* Please use one AmeriCheck™ each month — over the next three months — toward your *americast* cable bill, or your Ameritech local telephone or cellular bill. Three months from now, you'll receive three additional \$10 AmeriChecks™ — for a total savings of \$60. It's our special way of saying thanks to you!

We hope you continue to enjoy your *americast* service — and watch for new and exciting services to come in the months ahead. Once again, thank you for becoming an *americast* customer!

With warmest regards,


Deb Lenart
President

P.S. If you have any questions about your *americast* service, feel free to call us at 1-800-848-CAST™ (1-800-848-2278).

Ameritech.

presents



* Not valid toward Ameritech payphone service.
* See Ameritech's website (www.ameritech.com) for details on AmeriChecks.

EXHIBIT E

Order *americast*TM today and receive \$60 in AmeriChecksSM.

Use AmeriChecks just like cash to pay for any Ameritech[®] service. You can apply your \$60* toward:

- Your home phone bill
- Your cellular phone bill
- Your *americast* bill
- Ameritech Quick Reach[®] Paging



**SPECIAL INTRODUCTORY
americast PACKAGE**

Call today and enjoy *americast*'s expanded basic service, plus our set-top box featuring Ameritech's Interactive Program Guide and five premium channels:

- **Showtime 1 & 2**
- **The Movie Channel**
- **FLIX**
- **Sundance Channel**

All for only **\$29.95^{per month}**

Act now and get FREE installation.

Call 1-800-848-CAST
(2278)



americast Guarantees You'll Be Satisfied!



americast[®] is a new kind of cable television, bringing you the finest quality programming, state-of-the-art technology, and superior customer service.

If for any reason you are dissatisfied with your *americast* service, Ameritech pledges to refund your money! Just call us at 1-800-848-CAST[®] (2278) within 30 days from the date of your installation and we will give you your money back!

* \$30 in AmeriCheck vouchers will be provided 35-40 days from installation and an additional \$30 will be provided after 3 continuous months of service.

Service time only. Plus applicable fees and taxes. Equipment service charge not included. Wired serviceable areas only. Standard installation includes one hour of service plus the fee for any additional service required. Service fee for additional service required. Service fee for additional service required. Service fee for additional service required.

Installation and service are provided by Ameritech. Ameritech is not responsible for any damage to property or equipment caused by the use of the service. Ameritech is not responsible for any damage to property or equipment caused by the use of the service. Ameritech is not responsible for any damage to property or equipment caused by the use of the service.

© 1994 Ameritech

— EXHIBIT C —

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of)	
THE MICHIGAN CABLE TELECOMMUNI-)	
CATIONS ASSOCIATION et al. against)	Case No. U-11412
AMERITECH MICHIGAN.)	
<hr/>)	

At the December 19, 1997 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

On May 23, 1997, The Michigan Cable Telecommunications Association, Comcast Cablevision of Taylor, Inc., Comcast Cablevision of Southeast Michigan, Inc., MediaOne of Southeast Michigan, Inc., and Cablevision Industries Limited Partnership (collectively, MCTA) filed a complaint against Ameritech Michigan concerning a marketing program launched by Ameritech New Media, Inc., (New Media) to promote its americast™ cable television service. Complainants represent the Michigan cable television industry and include cable television companies that compete with New Media. New Media and Ameritech Michigan¹ are both

¹For purposes of this order, "Ameritech Michigan" refers only to the corporate entity Michigan Bell Telephone Company, which provides basic local exchange and other regulated telecommunication services in Michigan.

EXHIBIT C

wholly owned subsidiaries of Ameritech Corporation, and both use the assumed name "Ameritech."

The marketing program addressed in the complaint offered to issue prospective customers "AmeriChecks" as an inducement to subscribe to New Media's americast™ cable service, beginning in May 1997. AmeriChecks are pre-signed, pre-dated checks payable to the order of "Ameritech" in \$10 denominations and are drawn on a New Media bank account. Customers usually received either 6 or 12 AmeriChecks for subscribing to americast™ (depending upon the terms of their subscription) and could use the AmeriChecks to pay bills for most services offered by the various subsidiaries of Ameritech Corporation, including americast™ cable service and Ameritech Michigan's regulated telecommunication services. Except for the period June 9-30, 1997, Ameritech Michigan accepted AmeriChecks issued by New Media as payment for telephone bills at its Customer Payment Processing Center in Saginaw.

The complaint (which does not name New Media as a respondent) alleges that Ameritech Michigan violated Section 305(3) of the Michigan Telecommunications Act, MCL 484.2305(3); MSA 22.1469(305)(3), by providing basic local exchange service in combination with unregulated cable service at a price that does not exceed their total service long run incremental costs (TSLRIC). The complaint requested that the Commission (1) order Ameritech Michigan and its affiliates to terminate the AmeriChecks promotion and to cease and desist from violations of Section 305(3), (2) impose a fine under Section 601 of the Michigan Telecommunications Act, MCL 484.2601; MSA 22.1469(601), and (3) award the MCTA its costs and attorney fees for bringing the complaint.

At a prehearing conference on June 9, 1997, Administrative Law Judge James N. Rigas (ALJ) granted leave to intervene to Attorney General Frank J. Kelley (Attorney General). The Commission Staff (Staff) also participated.² The ALJ conducted evidentiary hearings on September 22-24, 1997. Thereafter, the parties filed briefs and reply briefs.

On November 12, 1997, the ALJ issued a Proposal for Decision (PFD), in which he found Ameritech Michigan in violation of Section 305(3) as a result of the AmeriChecks marketing program.³ He recommended that the Commission order Ameritech Michigan to cease and desist from further violations and award the MCTA its costs, including attorney fees. However, he recommended that no fine be imposed.

On November 19, 1997, Ameritech Michigan and the MCTA filed exceptions. On November 26, 1997, Ameritech Michigan, the MCTA, the Attorney General, and the Staff filed replies to exceptions.

²During the June 9, 1997 hearing, the ALJ denied the MCTA's motion for immediate issuance of an order requiring Ameritech Michigan to cease and desist from violating Section 305(3). Tr. 71-77. (The MCTA filed the motion along with the complaint.) On June 12, 1997, the MCTA filed an application for leave to appeal the denial of immediate relief. Because today's order resolves the complaint on its merits, the MCTA's application is denied as moot.

³The ALJ also recommended dismissal of two additional counts stated in the complaint: (1) that Ameritech Michigan violated Section 308(1) of the Michigan Telecommunications Act, MCL 484.2308(1); MSA 22.1469(308)(1), by subsidizing New Media's unregulated cable service and (2) that the Commission should commence an investigation to determine whether Ameritech Michigan or its affiliates violated the Michigan Consumer Protection Act, MCL 445.901 et seq; MSA 19.418(1), by making misrepresentations regarding the legality of using AmeriChecks to pay for regulated telephone services. With respect to the two counts, the ALJ found, respectively, that (1) there was no showing of cross-subsidization and (2) there was not an adequate basis to commence an investigation of possible consumer protection infractions. PFD at 19-20. No exceptions were taken to the ALJ's recommendation to dismiss the two counts, which the Commission adopts.

In its exceptions, Ameritech Michigan argues that the AmeriChecks promotion does not provide a factual basis for finding it in violation of Section 305(3), which states:

Until a provider has complied with section 304a,^[4] the provider of a rate regulated service shall not provide that service in combination with an unregulated service in section 401^[5] . . . at a price that does not exceed the total service long run incremental cost of each service.

MCL 484.2305(3); MSA 22.1469(305)(3). Ameritech Michigan makes three arguments based on the requirements or elements of Section 305(3), each of which, if well taken, would relieve Ameritech Michigan from a finding of being in violation of the statute.

First, Ameritech Michigan relies on Section 305(3)'s prefatory phrase: "[u]nless a provider has complied with section 304a." Ameritech Michigan contends that it has complied with the restructuring provisions of Section 304a with respect to its residential basic local exchange rates and that this compliance means that the restrictions in Section 305(3) are entirely irrelevant to its conduct. In this regard, Section 304a provides in part:

(1) Upon filing with and the approval of the commission, a basic local exchange provider shall restructure its rates for basic local exchange, toll, and access services to ensure that the rates are not less than the total service long run incremental cost of providing each service.

(2) The provider may determine when each rate is restructured and may phase in the rate restructuring until January 1, 2000. After January 1, 2000, the provider's rates for basic local exchange, toll, and access services shall not be less than the total service long run incremental cost for each service.

MCL 484.2304a; MSA 22.1469(304a).

⁴MCL 484.2304a; MSA 22.1469(304a), which sets forth the requirements for restructuring basic local exchange, toll, and access rates.

⁵MCL 484.2401; MSA 22.1469(401), which states that Commission authority does not extend to unregulated services, including cable service, "[e]xcept as otherwise provided by law or preempted by federal law."

Ameritech Michigan's current residential basic local exchange rates have been in effect since June 10, 1996. To substantiate its claim that those rates meet the statutory requirement of not being less than TSLRIC, Ameritech Michigan refers to the cost studies that it filed on January 21, 1997, at the onset of Case No. U-11280. After the Commission issued the July 14, 1997 order in Case No. U-11280 requiring certain modifications to the studies, Ameritech Michigan refiled modified studies on July 24, 1997. Ameritech Michigan claims that the modified studies demonstrate that all of its residential local exchange rates (as well as its business local exchange rates, except for Centrex in Access Area A) are now equal to or more than their TSLRICs. Ameritech Michigan notified the Staff in a letter dated August 20, 1997 that the rate restructuring was complete. Ameritech Michigan reasons that because neither its rates nor its costs have changed throughout the period covered by the complaint, its rates have met the TSLRIC standard over the course of this period.

Ameritech Michigan objects to the ALJ's interpretation of Section 304a, which requires Commission approval before rate restructuring can be deemed complete. According to Ameritech Michigan, Section 304a(1) only requires Commission approval when the provider seeks to change its rates pursuant to a restructuring, and then only when the Commission chooses not to allow rate changes to become effective through inaction under Section 304a(5). Ameritech Michigan reasons that a Commission order is not a prerequisite to restructuring when, as in this case, rates do not actually change. Ameritech Michigan points to Section 304a(2), which states that "[t]he provider may determine when each rate is restructured."

Ameritech Michigan also challenges the ALJ's statement that compliance with Section 304a requires that all of the provider's basic local exchange, toll, and access rates cover their TSLRICs.

Ameritech Michigan argues that, if the ALJ had applied only the words that actually appear in Section 305(3), he would have understood the statute to encompass only the rates that form the basis for an alleged violation of the statute. In this case, Ameritech Michigan continues, the only rates placed in issue by the complaint are those for residential local exchange services, which have already been restructured to comply with the TSLRIC standard.

In response, the MCTA, the Attorney General, and the Staff argue that Section 304a(1) unequivocally requires a provider to apply for and obtain Commission approval of its rate restructuring. They suggest that Ameritech Michigan's view, that a provider may comply with Section 304a by issuing a self-serving declaration of restructuring, would enable it to circumvent the statute's procedural safeguards. In this regard, the MCTA notes, Ameritech Michigan's own declaration of restructuring (in its August 20, 1997 letter) indicates that the restructuring is only partially complete, given that some basic local exchange, toll, and access rates do not yet meet the TSLRIC standard. The MCTA also notes that Ameritech Michigan's declaration is contingent in nature and will not become final until further proceedings in Case No. U-11280 pursuant to the Commission's September 30, 1997 order granting rehearing come to a conclusion.⁶ In any event, the MCTA maintains, Ameritech Michigan's claim of compliance with Section 304a continues to be premature so long as the Commission has not issued an order approving a restructuring. According to the MCTA, a Commission order addressing restructuring is not likely to be issued until the cost studies pending in Case No. U-11280 have been resolved with finality.

The record in this case shows that the New Media promotion, which promised that customers could use AmeriChecks to pay for their home phone bills, was announced as early as May 4, 1997.

⁶The MCTA also claims that, according to one of Ameritech Michigan's confidential discovery responses, its current Call Plan 50 rates for Access Area B do not cover their TSLRICs.

Ex. C-2. The record also shows that Ameritech Michigan began to accept AmeriChecks as payment for regulated telecommunication services from May 31 to June 9, 1997, and, after a self-imposed moratorium on the practice, from July 1, 1997 forward. Tr. 305-10. It is not clear on the record how long thereafter the practice remained in effect, given that Ameritech Michigan was unable to provide information on how AmeriChecks were applied to customers' bills after July 1, 1997. Tr. 308. However, it is apparent that Ameritech Michigan's practice of accepting AmeriChecks as payment for regulated services was in effect during parts of May, June, and July of 1997.

On the other hand, the cost studies that Ameritech Michigan relies upon to support a finding of compliance with Section 304a were not filed in their modified form until July 24, 1997, ten days after the Commission's order approving a methodology in Case No. U-11280 (and prior to the September 30, 1997 order granting rehearing). Thus, the record in this case establishes that Ameritech Michigan could not have been in compliance with Section 304a during periods in May, June, and July of 1997 when the New Media promotion was already underway and AmeriChecks were being accepted in payment of regulated services. Although Ameritech Michigan appears to suggest that its rates were in compliance with Section 304a at some point prior to May 1997, perhaps as early as the initial cost studies in Case No. U-11280 (filed in January 1997), it does not explain how restructuring could become effective on a retroactive basis. Moreover, the Commission does not find any support for the proposition that an order approving a cost study methodology (as did the July 14, 1997 order in Case No. U-11280) would have retroactive consequences under the Michigan Telecommunications Act.

In light of these findings, it is not necessary to determine on this record if or when Ameritech Michigan achieved compliance with Section 304a. It is evident from the record that the promotional practices alleged to violate Section 305(3) occurred at times when restructuring was not in effect. Moreover, this record focuses on a relatively narrow issue of an alleged violation of Section 305(3) through a marketing program launched by an affiliate of Ameritech Michigan and thus does not provide a suitable basis for determining whether Ameritech Michigan is now in compliance with its restructuring obligations, either in full or in part, or on a final or contingent basis.

Ameritech Michigan's second challenge to a showing of a Section 305(3) violation focuses on the prohibition against providing a regulated service "in combination with an unregulated service." According to Ameritech Michigan, it and New Media are not the same corporate entity, so that no one company was in a position to combine a regulated telecommunication service and an unregulated cable service, as would be required to show a violation of the statute. Ameritech Michigan emphasizes that it and New Media are separate subsidiaries of Ameritech Corporation and are engaged in separate lines of business. Ameritech Michigan says that the AmeriChecks promotion belonged entirely to New Media and that Ameritech Michigan did not have any control or other role in connection with cable service.

Ameritech Michigan further contends that there was not a combined package of telecommunication and cable services being offered to the public. Ameritech Michigan argues that New Media gave AmeriChecks to its cable customers as an inducement to take cable service alone, that New Media's cable customers are not necessarily Ameritech Michigan's customers for telephone service, and that the New Media customers are permitted to apply the AmeriChecks to a

variety of regulated and unregulated services. Ameritech Michigan maintains that there is not enough of a connection between its telecommunication services and New Media's cable service to find a violation of Section 305(3), particularly when the promotional practice in question does not adversely affect the public and instead enhances competition in the cable television market.

Ameritech Michigan claims that the ALJ's finding to the contrary is tantamount to invoking the doctrine of piercing the corporate veil, which is inappropriate in the absence of a showing of a fraud, sham, or abuse of the corporate form. Ameritech Michigan also objects to the ALJ's reliance on Section 217(2) of the Business Corporation Act, MCL 450.1217(2); MSA 21.200(217)(2), to reach the conclusion that Ameritech Michigan's and New Media's shared use of the assumed name "Ameritech" demonstrates that they were "participating together in a partnership or joint venture."⁷ According to Ameritech Michigan, Section 217(2) does not preclude two corporations, each with distinct corporate names, from sharing an assumed name.

In reply, the MCTA argues that Ameritech Michigan and New Media together, doing business under the "Ameritech" name, are essentially holding themselves out to the public as one entity. The MCTA says that the two companies offer both basic local exchange and cable service in 13 municipalities within the Detroit area. The MCTA points out that Ameritech Michigan and New Media, as subsidiaries of Ameritech Corporation, both use corporate services provided by the parent company, particularly corporate treasury functions. The MCTA claims that Ameritech Michigan also uses AmeriChecks in its own promotions, that Ameritech Michigan provides

⁷Section 217(2) provides in part: "The same name may be assumed by 2 or more corporations ... in the case of corporations and other enterprises participating together in a partnership or joint venture."

engineering, human resource, and other services to New Media under various agreements, and that Ameritech Michigan shares its vehicles and other equipment with New Media.

The MCTA adds that New Media's promotional materials blur any distinction between its americast™ cable service and other services provided by Ameritech Michigan and other Ameritech subsidiaries. The MCTA observes that those materials make the representation that the AmeriChecks are a valid means of paying for any of the Ameritech services. The MCTA argues that Ameritech Michigan violated Section 305(3) by accepting AmeriChecks as payment for regulated telecommunication services and that it could have, but did not, put an end to the violations by either terminating the promotion or refusing to accept AmeriChecks.

The MCTA suggests that Ameritech Michigan's reliance on an affiliate with the same assumed name to disavow responsibility for the AmeriChecks promotion is simply a device to circumvent Section 305(3). The MCTA claims that Section 217(2) of the Business Corporation Act requires two corporations that agree to do business under the same assumed name to stand in relationship to each other as partners or joint venturers.⁸ The MCTA and the Staff also argue that, although Section 305(3) does not require a showing of a piercing of the corporate veil, the facts of this case would present an appropriate instance for applying that doctrine.

The ALJ found that Ameritech Michigan did provide regulated services "in combination with" unregulated cable services. PFD at 16-17. The Commission is persuaded that the ALJ's finding is supported by the record. Ameritech Michigan and New Media both share in the benefit of the "Ameritech" brand name as a means of marketing their services, hold themselves out to the public

⁸The MCTA explains that Section 217(2) provides an exception to the general rule stated in Section 212(1)(b), MCL 450.1212(1)(b); MSA 21.200(212)(1)(b), prohibiting two corporations from using the same name.

as part of the same corporate family, and encourage the perception that they share an identity of interests. The AmeriChecks promotion used to induce public acceptance of americastTM cable service was also closely tied to the Ameritech name. By making AmeriChecks available to purchase regulated telecommunication services, the Ameritech companies drew on the marketing advantage of having a common identity with the Ameritech brand name.

The americastTM promotion represented AmeriChecks to the public as something that a customer could use to pay his or her home phone bill. Ameritech Michigan made a business decision to permit the AmeriChecks to be used as payment in this manner (except during part of June 1997). The opportunity for customers to use AmeriChecks as a discount or offset against the tariff rates for regulated services cemented the ties creating a combination of regulated and unregulated services.

The Commission rejects Ameritech Michigan's argument that Section 305(3) prohibits only a single company from offering a combination of regulated and unregulated services and does not apply when two separate, but affiliated, companies offer those services. Section 305(3) does not state that the unregulated services must be offered by the same corporate entity as the provider of regulated services. In this case, regulated and unregulated services were provided in combination by two wholly owned subsidiaries that market their services in a coordinated fashion. If Ameritech Michigan's interpretation of Section 305(3) had validity, any provider could circumvent the statutory constraints on joint marketing schemes by using an affiliate.

Ameritech Michigan's third argument focuses on Section 305(3)'s requirement that the combined services be provided "at a price that does not exceed the total service long run incremental cost of each service." Ameritech Michigan interprets this phrase to mean that two or more

combined services cannot be offered at a single price. Ameritech Michigan claims that it did not violate the statutory requirement because there are separate prices for its regulated telecommunication services and the unregulated cable service. Moreover, Ameritech Michigan adds, the prices of the regulated services always remained at their tariff levels, even when customers used AmeriChecks to pay for them. Ameritech Michigan explains that AmeriChecks are a source of funds with a stated cash value and are not a discount against a tariff rate. Ameritech Michigan contends that nothing in Section 305(3) requires services to be paid for with funds originating with the named customer.

Ameritech Michigan also objects to the ALJ's finding that providing cable service for free during the first month (another aspect of the americast™ promotion) violated Section 305(3) by reducing the price for the cable service to less than its TSLRIC. Ameritech Michigan explains that the free month promotion only affected cable customers committing to at least one year of americast™ service. Ameritech Michigan says that the TSLRIC standard should therefore be applied to cable revenues received over the course of the entire year. In addition, Ameritech Michigan contends, there is no basis in the Michigan Telecommunications Act for the Commission to conduct TSLRIC reviews of rates charged by an unregulated cable company.

Finally, Ameritech Michigan contends that it was improper for the ALJ to find a violation of Section 305(3) without requiring any showing of actual cross-subsidies or competitive harm.

The MCTA, the Attorney General, and the Staff respond that Ameritech Michigan misinterprets Section 305(3) by reading into it the requirement that a single price be offered for multiple services. The MCTA says that applying the TSLRIC standard necessarily requires a comparison of each service's individual rate with its associated cost. The MCTA also argues that Ameritech

Michigan's interpretation would enable it to circumvent Section 305(3) by simply quoting the price for two combined services as two prices that together equal the combined price.

The MCTA contends that if a customer uses a \$10 AmeriCheck to reduce his or her monthly tariff charge for local exchange service, the resulting rate will necessarily fall below its TSLRIC. The MCTA substantiates this contention by comparing the residential rates in the 13 Detroit area municipalities served by both Ameritech Michigan and New Media with their TSLRICs, as reported by Ameritech Michigan in confidential Exhibit C-53. The MCTA further observes that a Staff-conducted audit revealed instances in which AmeriChecks did in fact reduce charges for local exchange service below TSLRIC.

The MCTA argues that Ameritech Michigan also violated Section 305(3) when cable service was provided for one month free to its customers. The MCTA says that, regardless of how the TSLRIC of cable service is computed, it would necessarily be more than zero.

The MCTA argues that a violation of Section 305(3) does not require a showing of actual competitive harm. Nevertheless, the MCTA continues, the record makes clear that the marketing program used to promote cable service adversely affected the MCTA cable companies.

The Commission agrees with the ALJ that the statutory reference to providing a regulated service in combination with an unregulated service "at a price that does not exceed the total service long run incremental cost of each service" means that the price applicable to each service must be compared to its TSLRIC. PFD at 17. As argued by the MCTA, that interpretation best effectuates the words of the statute. Ameritech Michigan's reading requiring a single price for multiple services would be meaningless, given that a provider could easily circumvent it by manipulating its price structure. It would also defeat the purpose of Section 305(3), which is to prevent

providers from offering combinations of services at prices that do not bear an appropriate relationship to their costs.

Contrary to Ameritech Michigan's claim that AmeriChecks did not serve as rate discounts or otherwise alter the tariff charges for regulated services, the AmeriChecks were not cash equivalents in the hands of the customers. The AmeriChecks were payable to the order of Ameritech and presumably could not be exchanged for cash by the customers. See Ex. R-38.

The Commission further finds that the MCTA and the Staff have proven that the AmeriChecks can be, and in fact have been, used to reduce the rates paid for regulated telecommunication services below their TSLRICs. The record shows that if the tariff rates for Call Plan 50 and Call Plan 400 in Access Areas A and B are reduced by \$10 for one AmeriCheck, the resulting charges would be less than the TSLRICs of those services.

Although Ameritech Michigan has contended that there has been no showing of actual competitive harm, the Commission is not persuaded by this argument. Each element of a statutory violation, as defined in Section 305(3), has been satisfied. The Commission concludes that violations of Section 305(3) have been proven on this record.

In its exceptions, Ameritech Michigan argues that the ALJ erred in recommending that the MCTA be awarded its costs and attorney fees for bringing this complaint. Ameritech Michigan contends that the remedies provided in Section 601, MCL 484.2601; MSA 22.1469(601), are permissible only upon a showing that the violation resulted in an "economic loss," which Ameritech Michigan claims the MCTA failed to show. Ameritech Michigan adds that there is no causation between its conduct and the MCTA's litigation expenditures, which were entirely within the MCTA's control. Although Ameritech Michigan acknowledges that the Commission has

awarded costs and attorney fees in other cases, it argues that the general rule in Michigan permits attorney fees to be awarded only when a statute provides specific authority to do so. Ameritech Michigan contends that Section 601 does not grant this type of authority.

In reply, the MCTA argues that the September 30, 1997 order in Case No. U-11229 supports an award of costs and attorney fees as a means of making whole those persons incurring an economic loss, which includes the expenditure of attorney fees.

The Commission finds that Ameritech Michigan should reimburse the MCTA for its reasonable expenses, including attorney fees, that it incurred in bringing the complaint. As argued by the MCTA, this determination finds support in the September 30, 1997 order in Case No. U-11229, in which the Commission held that the City of Southfield was entitled to similar relief as a means of making the complainant whole for the economic losses it incurred in bringing a meritorious complaint against Ameritech Michigan for inadequate 9-1-1 service. The Commission finds that it would be inappropriate to force the MCTA to bear the financial burden of litigation that became necessary to redress Ameritech Michigan's violation of Section 305(3).

In its exceptions, the MCTA argues that the ALJ erred in declining to recommend the imposition of a fine against Ameritech Michigan. The MCTA says that the conduct giving rise to the violations was willful and the violations were intentional on Ameritech Michigan's part. The MCTA states that the weak arguments that Ameritech Michigan's attorneys used in an attempt to justify its misconduct fail to mitigate its wrongdoing. The MCTA also accuses Ameritech Michigan of using dilatory tactics to frustrate an immediate remedy for the MCTA on its complaint. Given Ameritech Michigan's past record of violations in marketing services jointly, the

MCTA proposes that the Commission assess a maximum fine under Section 601 of \$40,000 per day.

In response, Ameritech Michigan argues that imposing a fine under Section 601 is discretionary on the Commission's part and is inappropriate in light of the MCTA's failure to show why a fine would be appropriate to "make whole ratepayers and other persons who have suffered an economic loss." Ameritech Michigan says that Section 305(3) is ambiguous at best and that it had no actual notice or knowledge that its conduct would violate Section 305(3). Ameritech Michigan insists that it has the right to defend itself in complaint proceedings and should not be penalized for doing so. Ameritech Michigan asserts that the fact situation giving rise to the complaint was unique and affords no basis for escalating a penalty as a subsequent offense under Section 601.

The Commission adopts the ALJ's recommendation not to impose a fine under the circumstances shown in the record. As found by the ALJ, Ameritech Michigan's conduct did not appear to exhibit a willful disregard of the Michigan Telecommunications Act, and the rationale it advanced for its conduct had some (albeit a misplaced) basis in its interpretation of the act.⁹ The ALJ also found, based on the record, that the actual instances in which Ameritech Michigan applied AmeriChecks against charges for regulated services were relatively few in relation to the large number of payments processed by Ameritech Michigan. PFD at 20. The Commission is unaware of any analogous situation arising under the current version of Section 305(3) that would have served as a source of guidance in conducting a marketing program to promote cable service.

⁹Attempting to rationalize illegal conduct by asserting legal arguments does not relieve a party from responsibility for violating the Michigan Telecommunications Act. As stated in the March 10, 1995 order in Case No. U-10665 at 11-12: "[T]he Commission further rejects Ameritech Michigan's argument that, because it sought the advice of legal counsel and the law is ambiguous, the company should be exonerated from any sanctions for its violation of Act 179."

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACR, R 460.17101 et seq.
- b. The AmeriChecks promotion violated Section 305(3) of the Michigan Telecommunications Act.
- c. Ameritech Michigan should be ordered to cease and desist from further violations.
- d. Ameritech Michigan should pay the reasonable expenses and attorney fees incurred by the MCTA to bring this complaint.
- e. The application for leave to appeal filed by the MCTA on June 12, 1997 should be dismissed.

THEREFORE, IT IS ORDERED that:

- A. Ameritech Michigan shall cease and desist from further violations of the Michigan Telecommunications Act.
- B. Ameritech Michigan shall pay the reasonable expenses, including attorney fees, incurred by The Michigan Cable Telecommunications Association and other complainants in connection with this case.
- C. The application for leave to appeal filed by The Michigan Cable Telecommunications Association on June 12, 1997 is dismissed.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand

Chairman

(S E A L)

/s/ John C. Shea

Commissioner, concurring in part and
dissenting in part in a separate opinion.

/s/ David A. Svanda

Commissioner

By its action of December 19, 1997.

/s/ Dorothy Wideman

Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner, concurring in part and
dissenting in part in a separate opinion.

Commissioner

By its action of December 19, 1997.

Its Executive Secretary

In the matter of the complaint of
THE MICHIGAN CABLE TELECOMMUNI-
CATIONS ASSOCIATION et al. against
AMERITECH MICHIGAN.

)
)
)
)
)

Case No. U-11412

Suggested Minute:

“Adopt and issue order dated December 19, 1997 finding Ameritech Michigan to be in violation of Section 305(3) of the Michigan Telecommunications Act and granting relief on a complaint brought by The Michigan Cable Telecommunications Association, as set forth in the order.”

✱ ✱ ✱ ✱ ✱

bioRxiv preprint doi: <https://doi.org/10.1101/2019.05.29.259257>; this version posted June 3, 2019. The copyright holder for this preprint (which was not certified by peer review) is the author/funder, who has granted bioRxiv a license to display the preprint in perpetuity. It is made available under aCC-BY-NC-ND 4.0 International license.

Page 22
U-11412